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OCTOBER TERM, 1973

WILLIAMS & WILKINS CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

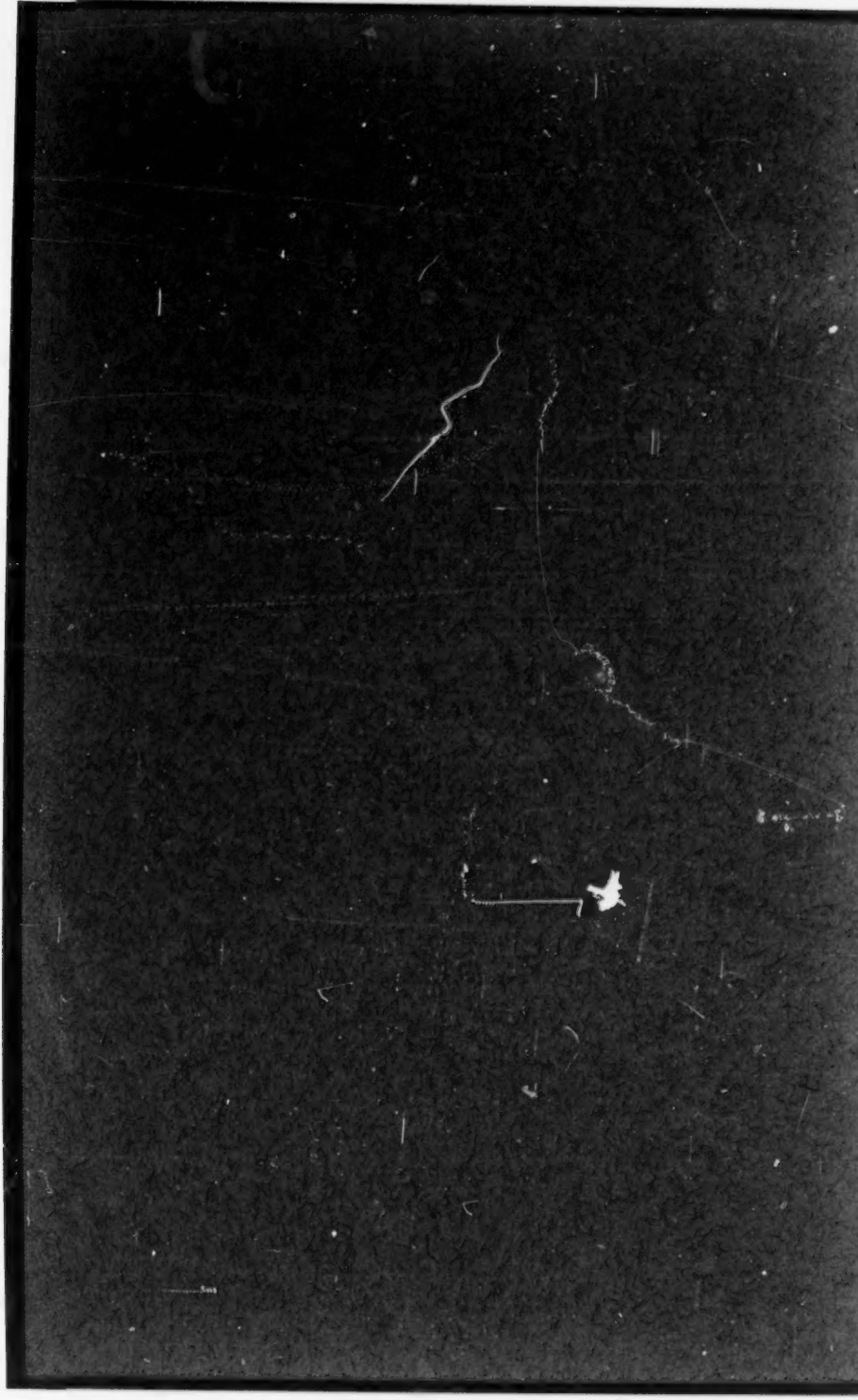
BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

CARLA A. HILLS,
Assistant Attorney General,

HARRIET S. SHAPIRO,
Assistant to the Solicitor General,

WILLIAM KANTER,
MICHAEL H. STEIN,
THOMAS J. BYRNES,
Attorneys,
Department of Justice,
Washington, D.C. 20530.



In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

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OPINION BELOW

The opinion of the United States Court of Claims (Pet. App.) is reported at 487 F. 2d 1345.

JURISDICTION

The judgment of the Court of Claims was entered on November 27, 1973. The petition for a writ of certiorari was filed on February 20, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether defendant's libraries, in furnishing single photocopies of journal articles to their patrons, made a fair use of petitioner's copyrighted journals, and thus did not infringe petitioner's copyrights.

STATEMENT

This suit was brought in the Court of Claims to recover compensation for the alleged infringement of petitioner's copyrights under 28 U.S.C. 1498(b). Petitioner claimed that respondent's libraries at the National Institutes of Health ("NIH") and the National Library of Medicine ("NLM") infringed certain copyrights allegedly owned by petitioner by furnishing to their patrons photocopies of articles appearing in journals published by petitioner. Respondent contended that in making such photocopies the libraries were merely making a permissible or fair use of petitioner's copyrighted journals and, thus, had not infringed petitioner's copyrights. The Court of Claims accepted respondent's contention and dismissed petitioner's complaint (Pet. App. 28, 29).

NIH is the principal federal medical research organization, employing over 12,000 persons of whom 4,000 have professional degrees. To support its medical research programs, NIH maintains a staff library, containing approximately 150,000 volumes of which about 30,000 are books and the balance journals. The library furnishes to NIH employees photocopies of

journal articles pertinent to their research work (Pet. App. 3, 4).

NLM was constituted in its present form by an Act of Congress in 1956. In this statute, Congress declared the purpose of NLM was "* * * to aid the dissemination and exchange of scientific and other information important to the progress of medicine and to the public health * * *" and to make available such information "* * * through loans, photographic or other copying procedures * * *." 42 U.S.C. 275, 276(4). NLM is a "library's library," and furnishes to other libraries, under the interlibrary loan program, photocopies of medical journal articles (Pet. App. 5).

Both the NIH library and NLM have adopted and enforced guidelines to limit their photocopy services. Both require a written request. Both will furnish only a single copy of a journal article per request, and both limit each request to 40 or 50 pages. (Exceptions to the page limit are sometimes made in the case of long articles.) Both have rules designed to avoid excessive copying from a single journal issue. In addition, NLM will not fill requests for articles from the 104 journals included in their "widely available list" [1] (Pet. App. 5, 6, 15).

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[1] A rejection on this basis is not made in the case of requests from government libraries, or in the case of a request for an article published more than 5 years before the request. The four journals identified in petitioner's complaint are named on the widely available list (Pet. App. 6).

The Court of Claims concluded that the library photocopying in this case was a fair use of the copyrighted material.[2] It rested this conclusion on the presence in this case of eight elements.[3] It noted that "probably the core of our evaluation" consisted of three propositions: 1) that plaintiff had not shown it was substantially harmed by the NIH and NLM practices;[4] 2) that the court was convinced medicine and medical research would be harmed by a finding that these practices constituted infringement; and 3) that, absent legislative guidance, the court should

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[2] "The judicial doctrine of fair use [is] one of the most important and well-established limitations on the exclusive rights of copyright owners * * *. Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts." H. Rep. No. 83, 90th Cong., 1st Sess., 29.

[3] "We do not have to, and do not, say that any particular component would be enough, either by itself or together with some of the others. Conversely, we do not have to, and do not, say that all the elements we mention are essential to a finding of 'fair use'. They all happen to be present here, and it is enough for this case to rule, as we do, that at least when all co-exist in combination a 'fair use' is made out" (Pet. App. 28).

[4] The court refused to assume that this photocopying had an adverse impact on petitioner's market for its copyrighted work, since it was likely that the user of the photocopy would, if the copy were not available, simply do without the information, rather than purchase the journal (Pet. App. 20-22).

not impose such a risk of harm on these fields (Pet. App. 14, 19-25).[5]

ARGUMENT

The decision of the Court of Claims is correct. This case is the first one to deal specifically with the question of the copyright consequences of library photocopying; it is, therefore, of substantial interest to libraries, researchers, and publishers.[6] Nevertheless, since the decision is limited to the holding that

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[5] The other elements identified by the court as indicating that the photocopying here challenged constituted a fair use of the materials were: 1) The total absence of any element of commercial gain to be derived from the reproduction, since these libraries are non-profit institutions, and the major users of the service are scientific researchers and practitioners who need the scientific materials involved for their work, and will not reduplicate them for sale or general distribution (Pet. App. 14-15); 2) Both libraries have reasonably strict limitations on the photocopying services provided, which effectively minimize potential harm to the copyright owner (Pet. App. 15-17); 3) The practice of library photocopying has long been accepted as appropriate (Pet. App. 17-19); 4) There is grave uncertainty that the prohibition on copying in the current copyright law extends to this practice, and the House Report on the proposed revision of that law indicates that library photocopying is a fair use in appropriate circumstances (Pet. App. 8-11, 23-27); and 5) The practice in foreign counties indicates that the library photocopying here is a fair use (Pet. App. 27-28).

[6] A holding that the photocopying involved here infringed petitioner's copyrights would substantially benefit petitioners and *amici* financially, since it would permit them to negotiate licensing agreements with NIH and NLM, and place them in a stronger position to negotiate such agreements with other libraries.

the photocopying by these libraries of these journals is a fair use of the copyrighted materials here involved, and disclaims any conclusions concerning the practice of photocopying in any other situations, the decision is in fact a narrow one, not meriting review by this Court.[7]

One of the reasons the court was careful to limit its holding to the precise facts of this case was its recognition of the inappropriateness of any attempt to establish judicially the broad principles which should govern the application of new technologies to copyright law, a matter "preeminently a problem for Congress * * * [since] [t]he choices involve economic, social, and policy factors which are far better sifted by a legislature" (Pet. App. 25). This Court has reached the same conclusion in *Teleprompter Corp.* v. *Columbia Broadcasting System*, No. 72-1628, decided March 4, 1974, slip op. p. 19: "shifts in current business and commercial relationships * * * simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago * * *. Detailed regulation of these relationships, and any ultimate resolution of the many

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[7] Moreover, the very fact that this is the first case to consider the propriety of any library photocopying, despite the fact that photocopying of library materials in this manner has been a common practice at least since 1935 (Pet. App. 17), indicates that the issue is not as significant to those concerned as petitioners and *amici* assert.

sensitive and important problems in this field, must be left to Congress [footnote omitted]." [8]

The Court of Claims properly concluded, for the reasons summarized *supra* at pp. 4-5, that the photocopying by NIH and NLM at issue here constitutes a fair use of the copyrighted materials, rather than an infringement of the copyright. Petitioner's attack on this holding rests primarily on two grounds: 1) the allegation that copying an entire article can never be fair use, and 2) the claim that the court below improperly refused to consider petitioner's willingness to license photocopying by NIH and NLM in determining whether they were infringing petitioner's copyrights. Neither point is well taken.

As the court noted, the suggestion that the copying of an entire copyrighted work cannot be a fair use is "an overbroad generalization, unsupported by the decisions, and rejected by years of accepted practice" (Pet. App. 13). See *New York Tribune, Inc.* v. *Otis & Co.*, 39 F. Supp. 67 (S.D.N.Y.); *Meeropol* v. *Nizer*, 361 F. Supp. 1063 (S.D.N.Y.).

The cases petitioner cites do not conflict with this conclusion, since they do not base their rejection of the defense of fair use on the fact that the entire work was copied. Indeed, in *Benny* v. *Loew's Inc.*, 239 F. 2d 532 (C.A. 9), affirmed by an equally divided court, *sub nom. Columbia Broadcasting System, Inc.* v. *Loew's Inc.*, 356 U.S. 43, the court re-

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[8] The court below noted that revision of the copyright laws is under consideration in Congress (Pet. App. 26). See also *Teleprompter, supra*, slip op. at 19 n. 16.

peatedly noted that "a substantial part" of the copyrighted play was appropriated.[9]

Petitioner argues that the court below erred "by completely ignoring petitioner's licensing program" (Pet. 18), and that, because petitioner is willing to license photocopying by these libraries, no harm to medical research can be anticipated from a holding that they have infringed petitioner's copyrights. But

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[9] The issue in *Benny* was whether a parody of a work infringed the copyright. Petitioner interprets *Public Affairs Associates, Inc.* v. *Rickover*, 284 F. 2d 262 (C.A. D.C.), judgment vacated, 369 U.S. 111, as indicating that there is no possibility of a defense of fair use when verbatim copies of speeches are taken (Pet. 16). But the court there stated only that the theory of fair use would not justify the publication of a work consisting in substantial part of quotations from a copyrighted work (*id.* at 272). In vacating the judgment for an inadequate record, this Court noted that "as to [*Rickover's*] copyrighted speeches, [the court of appeals] remanded the case to the District Court for determination of the extent to which 'fair use' was open to the plaintiff," 369 U.S. at 112.

Wihtol v. *Crow*, 309 F. 2d 777 (C.A. 8), the other case petitioner asserts conflicts with the holding below, held simply that "the copying of all, or substantially all, of a copyrighted song can [~~not~~] be held to be a 'fair use' merely because the infringer had no intent to infringe [citations omitted]," *id.* at 780. Instead, the court held, the proper test is whether the taking sensibly diminishes the value of the original or appropriates the author's labors. Judged by that test, the library photocopying here was a fair use.

In any event, there was no proper basis for a defense of fair use in any of these cases. *Benny* and *Rickover* involved attempts to exploit substantial portions of another's copyrighted work commercially, while *Wihtol* dealt with an unauthorized arrangement of a copyrighted musical work.

the court did not ignore petitioner's program (Pet. App. 24-25). Instead, it correctly concluded that the determination whether a given use is fair, and thus not subject to royalty payments, cannot turn on whether the copyright holder is willing to license it at reasonable rates.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

CARLA A. HILLS,
Assistant Attorney General.

HARRIET S. SHAPIRO,
Assistant to the Solicitor General.

WILLIAM KANTER,
MICHAEL H. STEIN,
THOMAS J. BYRNES,

Attorneys.

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